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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1352

HART BOOK STORES, INC., et al.,
Petitioners

V.

RUFUS EDMISTEN, et al.,
Respondents.

RESPONSE TO PETITION FOR CERTIORARI

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is not yet reported and is reproduced as Appendix A-1, with the Order denying rehearing reproduced as Petitioners' Appendix A-2.

The opinion of the United States District Court for the Eastern District of North Carolina is reported as 450

F. Supp. 904 (E.D.N.C. 1978) and is reprinted as Petitioners' Appendix C.

The opinion of the United States District Court for the Western District of North Carolina is unreported. The Court's Memorandum of Decision and Findings of Fact and Conclusions of Law are reprinted as Petitioners' Appendix B.

JURISDICTION

The jurisdiction of the Court has been invoked under 28 U.S.C. §1254(1) and 28 U.S.C. §2101(c).

QUESTIONS PRESENTED

I. Do the North Carolina State Statutes which prohibit the simultaneous sale of predominantly sexually oriented publications and the exhibition of predominantly sexually oriented motion picture films in the same building, premises or structure violate the First and Fourteenth Amendments to the United States Constitution because they deprive such stores, their customers, and those producing sexually oriented materials freedom of speech and freedom of the press in violation of the First and Fourteenth Amendments to the United States Constitution and also deprive them of other Constitutional rights as the price for exercising First Amendment rights?

II. Is the statutory scheme unconstitutional because it deprives the bookstores of Equal Protection of the laws in violation of the Fourteenth Amendment to the United States Constitution?

III. Is the statutory scheme unconstitutionally vague in violation of the First and Fourteenth Amendments to the United States Constitution because it proscribes the simultaneous sale of sexually oriented books and the exhibition of sexually oriented movies in the same "building, premises, structure or other facility . . . " based on whether or not most of the constitutionally protected material is "distinguished or characterized by an emphasis on matter depicting, describing, or relating to specified sexual activities or specified anatomical areas. . ."?

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

AMENDMENT I.

Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

NORTH CAROLINA STATUTORY PROVISIONS INVOLVED

North Carolina General Statutes §§14-202.10 through 14-202.12 (cum. supp. 1979):

§14-202.10. *Definitions.* As used in this Article:

(1) "Adult bookstore" means a bookstore having as a preponderance of its publications books, magazines, and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing, or relating to specified sexual activities or specified anatomical areas, as defined in this section.

(2) "Adult establishment" means an adult bookstore, adult motion picture theater, adult mini motion picutre theater, or a massage business as defined in this section.

(3) "Adult motion picture theater" means an enclosed building with a capacity of 50 or more persons used for presenting motion pictures, a preponderance of which are distinguished or characterized by an emphasis on matter depicting, describing, or relating to specified sexual activities or specified anatomical areas, as defined in this section, for observation by patrons therein.

(4) "Adult mini motion picture theater" means an enclosed building with a capacity for

less than 50 persons used for presenting motion pictures, a preponderance of which are distinguished or characterized by an emphasis on matter depicting, describing, or relating to specified sexual activities or specified anatomical areas, as defined in this section, for observation by patrons therein.

(5) "Massage" means the manipulation of body muscle or tissue by rubbing, stroking, kneading, or tapping, by hand or mechanical device.

(6) "Massage business" means any establishment or business wherein massage is practiced, including establishments commonly known as health clubs, physical culture studios, massage studios, or massage parlors.

(7) "Sexually oriented devices" means without limitation any artificial or simulated specified anatomical area or other device or paraphenalia that is designed in whole or part for specified sexual activities.

(8) "Specified anatomical areas" means:

a. Less than completely and opaquely covered: (i) human genitals, pubic region, (ii) buttock, or (iii) female breast below a point immediately above the top of the areola; or
b. Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

(9) "Specified sexual activities" means:

a. Human genitals in a state of sexual stimulation or arousal;
b. Acts of human masturbation, sexual intercourse or sodomy; or
c. Fondling or other erotic touchings of human genitals, pubic regions, buttocks or female breasts.

§14-202.11. *Restrictions as to adult establishments.* No building, premises, structure, or other facility that contains any adult establishment shall contain any other kind of adult establishment. No building, premises, structure or other facility in which sexually oriented devices are sold, distributed, exhibited, or contained shall contain any adult establishement.

§14-202.12. *Violations; penalties.* Any person who violates G.S. 14-202.11 shall be guilty of a misdemeanor and shall be imprisoned for a term not to exceed three months or fined an amount not to exceed three hundred dollars ($300.00), or both, in the discretion of the court. Any person who has been previously convicted of a violation of G.S. 14-202.11, upon conviction for a second or subsequent violation of G.S. 14-202.11, shall be guilty of a misdemeanor and shall be imprisoned for a term not to exceed six months or fined an amount not to exceed five hundred dollars ($500.00), or both, in the discretion of the court.

STATEMENT OF THE CASE

Respondents do not believe that a complete counter-statement of the case would materially assist the Court in determining whether to grant certiorari. However, Petitioners' statement that the Eastern District "found as a fact that the bill's sponsor had heralded the bill as one which would raise the overhead of adult bookstores and drive them out of business . . ." (Pet. 10) stands in need of correction. Although Judge Dupree did admit the affidavits of two newspaper reporters who contended that Representative Morgan had made such remarks, he also admitted an affidavit from Representative Morgan himself which said:

> My intention in sponsoring House Bill 961 was to require the separation of: (1) the sale of sexually explicit books; (2) exhibition of sexually explicit movies; and (3) sale of sexual devices, so as to prevent the operation of sex supermarkets in North Carolina. It seemed to me that if these three enterprises were required to operate in different buildings, the immoral atmosphere and unsanitary conditions described in the health inspector's letter[1] would be less likely to occur.

---

[1]The letter referred to in Representative Morgan's affidavit had been written by a local health inspector to Senator I. Beverly Lake, Jr.:

> Dear Senator Lake:
>
> Pursuant to a report disclosing unspeakable and revolting activity at one of Raleigh's so-called adult book shops I had an inspection made by our two top-ranking sanitarians—on June 16, 1977.

Customers would be less likely to loiter and congregate for extended periods of time if the

---

They visited five such establishments. At each they saw the usual array of pornographic publications. They found also cubicles or small booths where patrons enter, deposit a quarter and view assorted salacious films. Certain of the male customers masturbate under the resulting stimulation, ejaculating upon the floor and the walls. The volume of semen was so considerable by mid-afternoon as to be trickling down the wall to the floor. Customers went to and fro, oblivious to others present and seemingly not repelled by these degenerate surroundings.

Each of the five places checked has such cubicles and film projecting equipment. These numbered from twelve to sixteen.

Though only male customers were seen on this occasion, females are also afforded similar attention. Dildos of every description were available for sale, for use on the premises or for removal therefrom.

Used condoms littered the floors. The use therefor can only be speculated upon.

When questioned about the mess, the operators generally observed that it didn't do much good to clean up; 'Twas soon all to do over again. 'One with dubious wit or with exquisit drollery observed that the State should indeed license these places to 'clean em up.'

Hoping this report will serve alike your purpose and the commonweal, I am

Ever so sincerely,
Millard B. Bethel, M.D., M.P.H.
Director

functions were separated. My bill was intended to prevent sexual activity on the premises without significantly curtailing the sale and exhibition of sexually explicit books, sexually explicit movies and devices.

Judge Dupree made no finding as to which affidavit was correct. (App. 67-68).

ARGUMENTS

I.

THE NORTH CAROLINA STATUTES AT ISSUE DO NOT SUPPRESS FREEDOM OF SPEECH.

Much of the Petition for Certiorari is predicated upon the mistaken contention that N.C.G.S. § 14-202.10 *et seq.* suppresses freedom of speech. In assessing this claim, it must be remembered that, like the Plaintiffs in YOUNG v. AMERICAN MINI-THEATRES, 427 U.S. 50 (1976), "(t)here is no suggestion that [any of the Plaintiffs] is anything more than a commercial purveyor. They do not profess to convey their own personal messages through the [books they sell or] movies they show, so that the only communication involved is that contained in the [books and] movies themselves." *Id.* at 78 (n.2) (concurring opinion of Powell, J.). Consequently, the only First Amendment claim Petitioners can make is the effect of the statute on the dissemination of the materials. In fact, the statute in no way restricts what a consenting adult may read, view or

purchase. So far as this statute is concerned a store may sell (and a customer may purchase) the most hard core of pornographic books. Indeed, under North Carolina law, a person may only be prosecuted for disseminating an obscene film or book to an adult after a prior adversary proceeding in which a judge declared the film or book obscene. In sum, North Carolina has gone to great lengths to ensure that the viewing and reading habits of its citizenry are properly respected.

Much of Petitioners' objection to the statute seems to be that it does not go far enough towards eradicating the evils described in Dr. Bethel's letter, (n. 1 *supra*). But surely Judge Phillips' observation for the Fourth Circuit is the telling answer to that objection.

> Though the particular method chosen by North Carolina may not prove to be effective in eliminating the undesirable spin-off conditions, we cannot say that legislative action is rendered irrational by its choice of a less efficacious and less powerful approach than the Constitution might permit. (A-30)

Restraint is the hallmark of this statute. Rather than allowing any of its citizens to be deprived of either a single book or movie, the legislature enacted an extremely narrow statute to deal with the problem. The statute impinges far less upon First Amendment values than a large number of statutes sustained by this Court.

In YOUNG v. AMERICAN MINI-THEATRES, *supra*, for example, one could not open an adult movie theatre or bookstore within a thousand feet of another regulated use. The statute at bar permits one to open such an establishment anywhere except in the same building. Under this statute, if five adult establishments were on the same block, a sixth could open tomorrow. In Detroit, if even two were within a thousand feet, a third could not open. Under North Carolina law, a store owner is the master of his own destiny. He may sell all the dirty books or show all the dirty movies he desires. He simply cannot do both in the same building. In Detroit, on the other hand, one person's pool hall can make another's bookstore unlawful. Thus, the statute at bar intrudes upon First Amendment values far less than the YOUNG zoning ordinance upheld by this Court.

Similarly, statutes, ordinances, or regulations forbidding a door to door magazine salesman from knocking on a homeowner's door without prior permission [BREARD v. ALEXANDRIA, 341 U.S. 622 (1951)], totally prohibiting political advertising in public transit vehicles [LEHMAN v. SHAKER HEIGHTS, 418 U.S. 298 (1974)], absolutely precluding prime time use of the airwaves to broadcast a presumptively nonobscene monologue entitled "Filthy Words" [F.C.C. v. PACIFICA FOUNDATION, 438 U.S. 726 (1978)], and punishing a political dissenter for burning his draft card [UNITED STATES v. O'BRIEN, 391 U.S. 367 (1968)] have been upheld.

As the Fourth Circuit unanimously held, the less intrusive statute at bar should also be upheld.

II.

THE STATUTE IS PRECISELY TAILORED TO AN IMPORTANT STATE INTEREST.

In PARIS ADULT THEATRES v. SLATON, the Court described anti-obscenity laws as preserving certain basic societal values: "These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly the public safety itself." 413 U.S. 49, 58 (1973). The statute at bar addresses these problems more precisely than the typical obscenity statute which turns on such refinements as whether (1) the appeal to the prurient interest is predominant (obscene) or merely substantial (nonobscene), (2) sex is described in a patently offensive manner (obscene) as opposed to an ordinarily offensive manner (nonobscene), or (3) the material has serious artistic value (nonobscene) rather than artistic value which does not quite reach the level of being serious (obscene).

The legislature, after hearing evidence of the degenerate conditions in sex supermarkets, was determined to improve the quality of life and the tone of commerce in the adult shops. The statute which resulted is well calculated towards these ends.

The Petition for Certiorari posits that "(m)ost normal people enjoy looking at sex books and reading sex fantasies, which is why abnormal people have to spend so much time and money suppressing them . . ."

(Pet. 21, *quoting* from JOY OF SEX). Rather than spending time or money suppressing books, the statute creates a more wholesome atmosphere in places where such books can be purchased. Surely, the normal person does not enjoy slipping on semen when he or she attempts to purchase his or her sexually explicit book.

The presence of health laws which operate after the fact to punish violators is no solution. The problem is the unwholesomeness of the atmosphere which helps create the degenerate conditions in the first place. Surely, nobody would contend that street lights should not be placed on a dark street corner where several rapes have occurred simply because rapists can be punished. For both the book store and the street corner, an ounce of prevention is worth a pound of cure.

Even more to the point is CALIFORNIA v. LARUE, 409 U.S. 109 (1972) which upheld a California alcoholic regulation that precluded certain nonobscene sexually explicit entertainment from being presented where alcohol was served. The rationale of that regulation, like the statute at bar, was that two individually acceptable items (sexually explicit entertainment and alcohol in LARUE - sexually explicit books and sexually explicit movies here) are not acceptable when combined because the sum of their deleterious effects is greater than their component parts.

Although LARUE did allude to the Twenty-First Amendment, it seems clear that that Amendment would not have saved the statute had it been violative of

the First Amendment. [*Cf.* WISCONSIN v. CONSTANTINEAU, 400 U.S. 433 (1971), holding that the Twenty-First Amendment could not prevail over procedural due process in regard to the State's listing those individuals who are unfit to purchase liquor.] Rather, the Court held that "the critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishments which it licenses to sell liquor by the drink." 409 U.S. at 118.

Once it is recognized that N.C.G.S. § 14-202.10 *et. seq.* are important regulations which do not suppress free speech and are precisely tailored to improving the quality of life and the tone of commerce in adult book stores and movie theatres, much of the Petition for Certiorari falls of its own weight.

III.

THE STATUTE IS NOT UNCONSTITUTIONALLY VAGUE.

Petitioners contend that the term "building, premises, structure, or other facility" is unconstitutionally vague. They raise the spectre of one store owner's being convicted under the statute for operating a bookstore in a high rise building or shopping mall because another store was conducting a different type of adult establishment. However, none of Petitioners claim to operate under such a cloud. Rather, each Petitioner, so far as the record shows, is the

only adult establishment in the building in which he operates. Consequently, under the majority (Stevens, Burger, White, Rehnquist, and Powell) opinion in YOUNG v. AMERICAN MINI-THEATRES, *supra,* this issue is not properly before the Court.

Petitioners also express concern about the vagueness of " 'preponderance' of books 'distinguished or characterized by an emphasis' on matter 'depicting, describing or relating to' certain sexual activity." (Pet. 39). Essentially, they are bemoaning the fact that they cannot be sure that their 49% sexually explicit books will not turn out to be 51%, thereby combining with their sexually explicit movies to render them a forbidden sex supermarket. This is nothing more than the familiar complaint of one who intentionally treads on the very edge of permissible conduct and complains because he might fall on the wrong side. *Cf.* NASH v. UNITED STATES, 229 U.S. 373, 377 (1913). Petitioner may avoid this problem by not treading so close to the line. They could dispense only adult books or only adult movies at any given location. So long as they choose to dispense substantial quantities of both, they of course risk becoming a sex supermarket and being punished accordingly.

The vagueness complaint at bar is very different from a bona fide First Amendment vagueness claim. The nub of a bona fide complaint is that a vague statute necessarily deters more than it forbids, and that which it deters is protected by the Constitution. For example, WINTERS v. NEW YORK, 333 U.S. 507 (1948) invalidated the standard "so massed as to become vehicles for

inciting violent and depraved crime" as the test for whether a magazine could be sold, *Id* at 513. The standard was so imprecise that its presence would deter the dissemination of constitutionally protected material.

In the case at bar, the statutory standard might cause a prudent adult mini-theatre owner to sell only 20% sexually explicit books or, perhaps, sell his sexually explicit books at a different location, thereby eliminating the sex supermarket atmosphere entirely. Since there is no constitutional right to run a sex supermarket at all, (see Arguments I and II, *supra.), the* fact that the statute may deter such supermarkets more than it forbids them does not aid Petitioners' vagueness argument.

CONCLUSION

For the reasons presented in Argument III, Respondents contend that the vagueness argument is insubstantial, basically unimportant, and not worthy of this Court's time. On this issue certiorari should be denied.

The certiorari worthiness of the First Amendment issue[2] is a closer question. In favor of denying the writ is

[2]Respondents agree with Petitioners that the equal protection issue is "(c)losely related to the First Amendment problems presented by the legislation at issue . . . ." (Pet. 36). Consequently, this Response has been couched in First Amendment terms. It is Respondents' position that First Amendment equal protection cases such as *Young v. American Mini-Theatres, supra* or *Police Department v. Mosley,* 408 U.S. 92 (1972) are essentially First Amendment cases and should be so analyzed.

Absent the First Amendment considerations in this case, any equal protection claim would be frivolous. *Cf. City of New Orleans v. Dukes,* 427 U.S. 297 (1976); *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974).

the fact that the unanimous Fourth Circuit opinion was unquestionably a correct statement of the law. (See Arguments I and II, *supra.)* Furthermore, there is neither nor is there likely to be a split among the lower courts, since, so far as Respondents know, North Carolina is the only state in the Union which has enacted a statute prohibiting sex supermarkets.

On the other hand, both the North Carolina statute and the Fourt Circuit opinion are models of the dispersal (as contrasted with the suppression) approach to the regulation of adult establishments. Thus, granting certiorari to affirm Judge Phillips' excellent opinion is likely to have a salutory effect upon encouraging such Constitutional Legislation. The question, then, is whether the need to convey this message to the nation is sufficiently important to grant certiorari in light of the correctness of the decision below and the overall caseload of this Court. On this question, Respondents take no position.

Respectfully submitted

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CERTIFICATE OF SERVICE

This is to certify that three (3) true and correct copies of the foregoing Response to Petition for Certiorari has been served upon the following by depositing three (3) copies of the same in the United States Mail, postage prepaid, addressed to:

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This the 13th day of May, 1980.

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